Order Denying Rehearing

JUDGMENT

February 10, 1961

This cause has been heard and considered upon oral arguments, briefs of counsel, and upon the record;

And it appearing that the order of dismissal of the District Court, upon authority of *Wesley D. White, et al.*, v. *Thomas S. Gates, Jr., Secretary of the Navy, et al.*, 253 F. 2d, 868, certiorari denied, 356 U. S. 973, was a proper disposition of the case;

The judgment of the District Court is affirmed, and it is so ordered.

ENTER:

/s/ Marion S. Boyd,
United States District Judge.

ORDER DENYING REHEARING

April 13, 1961

The petition of the appellants for rehearing has been duly considered by the Court and is found to be without merit..

Accordingly, it is denied.

Approved for entry:

/s/ Marion S. Boyd,
United States District Judge.

COMPARISON CHART

Mr. Daryl George (veteran)	*Mr. Charles A. Ross (non-veteran)*
In Military Service from March 16, 1944, to March 25, 1944.	Separated from home and family. Mode of life seriously disrupted. Could not be expected to resume his regular activities without re-employment and rehabilitation aids. The war situation was tense—Japanese fleet lying out off the coast. Repaired combat aircraft—repaired wings and patched fuselage—repaired gun mounts where a 20 millimeter shell had hit. Forty-five miles from the combat area. Twenty-four hour alert. Working in blackout and through the daytime. Constantly under bombardment. Scratch or a piece of shrapnel hit me on the ankle. We hit the ditches. We helped to put out the fires. I manned one of the machine guns to help a sergeant fight strafers that were coming in ahead of the bombers. During bombardment, continued job at the rate of 24 hours a day. We used a sheet metal shop, which was set up in a home. We made wing tanks—so what planes we did have could still be maintained in operation, in flight. We used Quezon Boulevard for a runway, for fighter planes taking on and off. No longer in a protected American reservation. Guarded the last plane and helped lieutenant take the plane off from Manila.

Mr. Daryl George (veteran)

Mr. Charles A. Ross (non-veteran)

Combat zone now 30 miles from Manila but Japanese soldiers within five to ten miles of the city—they were moving in.
U. S. Military had all moved out to Bataan. . . .
Still doing our jobs.
Taken prisoner January 2, 1942.
Armed Japanese soldiers—lucky the Captain could speak English—he was American born.
Fixed up emergency kits of food and bedding.
Processed, searched and taken to Santa Tomas Internment Camp.
Physical condition excellent; weight, 168.
Treatment from Japanese was rough.
Quite a few never came back from Fort Santiago—the old Spanish prison.
Some were beaten with their saber chains—some were hit across the side of the face with the flat part of their sword.
Tough all the way around for everybody (Feb., 1944).
Standing out at nights for roll call while Japanese tried to locate missing individuals (who had died that day and were buried).
American forces used interment camp as headquarters.
Mortar shells and artillery hitting us.
Physical condition; 100 pounds, teeth loose, no hair.
Mr. Ross had destroyed government property in the face of enemy fire (so it could not be captured).
His wife heard NOTHING from December 1941 to January 1943, as to whether he was alive or dead.
Mr. Ross later received a civilian meritorious service award.

(Record 29a-42a)

Comparison Chart

EXCERPTS FROM STIPULATION AND AFFIDAVITS IN WHITE v. GATES, 287 F. 2d 884

The following stipulation of facts was entered in the *White* decision:

"STIPULATION OF FACTS

"It is hereby stipulated and agreed that:

"Due to a reduction in the scheduled workload at the Charleston Naval Shipyard, reduction in force notices were issued to approximately 500 Shipyard employees during the month of April 1956. Due to an unforeseen increase in the workload, most of the outstanding reduction in force notices were *cancelled* on May 17, 1956.

"Wesley D. White, employed at this Shipyard as a Pipefitter, Pay No. 56-13735, *has not been issued a reduction in force notice* and there is no indication he will be issued a reduction in force notice." (Emphasis supplied.)

Furthermore, counsel for the government in the *White* case filed several affidavits to the effect that the Plaintiffs in the District of Columbia case were still on the job; for example,

"Due to an unexpected increase in the workload Wright's *notice of a reduction in force was cancelled* on 16 May 1956." (Emphasis supplied.)

"On 1 March 1956, George R. Phillips was offered and accepted a change to lower grade . . . *in lieu of reduction in force.*" (Emphasis supplied.)

"On 16 May 1956, due to an unexpected increase in workload, Mr. Bluerock's notice of separation due to reduction in force was cancelled."

"On April 3, 1956, Mr. Hammond was issued a notice of separation because of reduction in force, his last day of work to be 11 May 1956 and his date of separation to be effective on 2 July 1956. . . . Due to retire-

ment of another Leadingman Welder (Electric) Hammond's reduction in force notice was cancelled on 17 April 1956."

"On 16 May 1956, due to an unexpected increase in the workload, Williams' notice of reduction in force was cancelled."

These affidavits were attached to the government's motion for summary judgment and appear at pages 22-27 of the Joint Appendix in the *White* case.

EXECUTIVE ORDERS (Pertinent text thereof)

1. Executive Order No. 8561, October 4, 1940: Volume 3 (Classification and selection) of regulations governing the administration of the Selective Service Act prescribed—5 Federal Register 3923 (October 8, 1940). These regulations defined a "necessary man." The local draft board determined who was a "necessary man."

2. Executive Order No. 9309, March 6, 1943, 8 Federal Register 2911 (Wednesday, March 10, 1943). This Order controlled government requests for the Selective Service deferment of Federal Employees.

I, subparapraph 1 provided:

> "No agency shall request the selective service deferment of any employee on occupational grounds except in accordance with the provisions of this Order. No employee shall initiate a request for his own deferment on occupational grounds or advocate the making of such a request on his own behalf."
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> * * * * *
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> "IV. Requests for Deferment
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> "3. In preparing the prescribed selective service form for submitting a request for occupational deferment to the local selective service board, the Agency Committee shall enter on such form the words 'Government Request,' and shall also indicate thereon the name of the agency and the subordinate part thereof in which the registrant is employed.
>
> "4. In any case in which a Government request for deferment is denied by a local selective service board, the Agency Committee concerned shall at once file an appeal from such action. The appeal *shall stay the induction* of the employee affected until final decision in the case." (Emphasis supplied.)
>
> "V. Voluntary Entrance Into Armed Forces

Executive Orders (Pertinent text thereof)

"1. Unless an Agency Committee has requested or would request deferment of an employee under this Order, the agency, upon his request, shall grant him a release to enter the armed forces voluntarily in a commissioned or enlisted status.

"2. If an Agency Committee has requested or would request deferment of an employee under this Order, the agency *shall deny him such a release* unless it is determined that:

"a. The employee is likely to be assigned to active combat service; *or*

"b. The employee's skills and ability probably will be utilized equally or more effectively in the armed forces." (Emphasis supplied.)

EDITORIAL

The following editorial by the editor of the Dayton Journal Herald on Tuesday, February 14, 1961, shortly after the decision of the Court of Appeals, is quoted:

"MERIT SYSTEM MOCKED

"The forlorn fight of half a dozen Wright-Patterson base employes to declare the Veterans Preference Act unconstitutional has lost another major round and the injustice done in the name of rewarding those who once wore the uniform goes on.

"At the base there were long-term employes who were too young to retire, too old to get other jobs without great difficulty, who lost out in the personnel shift of last year to far younger men who had seen some kind of service. Some of the losers were never in uniform because their government declared that their best service during World War II could be right there at Wright-Patterson as civilians. Some of the winners wore the uniform on the very same post.

"Perhaps there's reason for giving a returning veteran a leg up for any job vacancy at war's end, though some of us didn't see the need of it at the time, but this business of giving him a lifetime advantage over the next fellow is wrong. It mocks the very principle of a merit system."